

IN THE COURT OF CRIMINAL APPEALS OF TENNESSEE
AT NASHVILLE

BARRY LEE ARMISTEAD v. STATE OF TENNESSEE

Appeal from the Criminal Court for Davidson County
No. 99-D-2724 Seth W. Norman, Judge

No. M2007-00933-CCA-R3-HC - Filed February 15, 2008

This matter is before the Court upon the State's motion to affirm the judgment of the trial court by memorandum opinion pursuant to Rule 20 of the Rules of the Court of Criminal Appeals. Petitioner has appealed the habeas corpus court's order summarily dismissing the petition for writ of habeas corpus. Upon a review of the record in this case, we are persuaded that the habeas corpus court was correct in summarily dismissing the habeas corpus petition and that this case meets the criteria for affirmance pursuant to Rule 20 of the Rules of the Court of Criminal Appeals. Accordingly, the State's motion is granted and the judgment of the trial court is affirmed.

Tenn. R. App. P. 3 Appeal as of Right; Judgment of the Trial Court is Affirmed.

JERRY L. SMITH, J., delivered the opinion of the court, in which DAVID H. WELLES, and ROBERT W. WEDEMEYER, JJ., joined.

Barry Lee Armistead, Pro Se, Nashville, Tennessee.

Robert E. Cooper, Jr., Attorney General & Reporter; Sophia S. Lee, Assistant Attorney General, for the appellee, State of Tennessee.

MEMORANDUM OPINION

Factual Background

On June 29, 2000, Petitioner, Barry Lee Armistead, pled guilty in Davidson County to two counts of aggravated assault. The trial court sentenced him to four years for each conviction to be served consecutively to each other and consecutively to a prior Putnam County conviction. *State v. Barry Lee Armistead*, No. M2002-01877-CCA-R3-CD, 2003 WL 22116621, at *1 (Tenn. Crim. App., at Nashville, Sept. 11, 2003), *perm. app. denied*, (Tenn. Jan. 26, 2004). The trial court ordered

that the sentences be served on probation. *Id.* A short time later, Petitioner's probation was revoked. *Id.* The revocation of his probation was affirmed by this Court. *Id.* at *3.

On December 15, 2006, Petitioner filed a Petition for a Writ of Habeas Corpus. Petitioner based his petition on the fact that his Davidson County conviction was revoked on July 10, 2002, prior to the expiration of his Putnam County sentence on November 11, 2004. Petitioner also stated that he did not have a new charge or conviction at the time of the revocation. Therefore, Petitioner contends that his sentence is illegal because the trial court placed his sentence into effect before his Putnam County sentence expired. On March 22, 2007, Petitioner filed a Notice to Withdraw his petition. On March 26, 2007, the trial court denied Petitioner's Petition for a Writ of Habeas Corpus by order.

Petitioner appeals to this Court arguing that (1) the habeas corpus court lacked jurisdiction to rule on the merits of the petition after he filed his Notice to Withdraw; (2) the habeas corpus court abused its authority "in light of [P]etitioner stating his desire to withdraw the petition; and (3) the habeas corpus court "misrepresented the facts petitioner referenced in his petition."

Analysis

We initially address Petitioner's claim that the habeas corpus court did not have jurisdiction to rule on his habeas corpus petition because Petitioner had filed a Notice to Withdraw his petition. The habeas corpus court did not enter an order on Petitioner's notice. Therefore, we must assume that the habeas corpus court impliedly denied Petitioner's Notice to Withdraw by entering an order summarily dismissing his petition. A petitioner must have the leave of court to allow the withdrawal of a pleading. *See Green v. Moore*, 101 S.W.3d 415, 420 (Tenn. 2003) (holding that a party may not file a voluntary non-suit to conclude an action and lead to an appeal without an adjudication by a trial court and that a trial court speaks through its written orders and duly entered minutes and must make a ruling in order for all claims to be adjudicated); *Williams v. State*, 831 S.W.2d 281, 282-83 (Tenn. 1992) (holding that there are bases upon which a trial court must rely when ruling on whether a petitioner may voluntarily withdraw his petition for post-conviction relief).

The determination of whether to grant habeas corpus relief is a question of law. *See Hickman v. State*, 153 S.W.3d 16, 19 (Tenn. 2004). As such, we will review the habeas corpus court's findings de novo without a presumption of correctness. *Id.* Moreover, it is the petitioner's burden to demonstrate, by a preponderance of the evidence, "that the sentence is void or that the confinement is illegal." *Wyatt v. State*, 24 S.W.3d 319, 322 (Tenn. 2000).

Article I, section 15 of the Tennessee Constitution guarantees an accused the right to seek habeas corpus relief. *See Taylor v. State*, 995 S.W.2d 78, 83 (Tenn. 1999). A writ of habeas corpus is available only when it appears on the face of the judgment or the record that the convicting court was without jurisdiction to convict or sentence the defendant or that the defendant is still imprisoned despite the expiration of his sentence. *Archer v. State*, 851 S.W.2d 157, 164 (Tenn. 1993); *Potts v. State*, 833 S.W.2d 60, 62 (Tenn. 1992). In other words, habeas corpus relief may be sought only

when the judgment is void, not merely voidable. *See Taylor*, 995 S.W.2d at 83. “A void judgment ‘is one in which the judgment is facially invalid because the court lacked jurisdiction or authority to render the judgment or because the defendant’s sentence has expired.’ We have recognized that a sentence imposed in direct contravention of a statute, for example, is void and illegal.” *Stephenson v. Carlton*, 28 S.W.3d 910, 911 (Tenn. 2000) (quoting *Taylor*, 955 S.W.2d at 83).

However, if after a review of the habeas petitioner’s filings the habeas corpus court determines that the petitioner would not be entitled to relief, then the petition may be summarily dismissed. T.C.A. § 29-21-109; *State ex rel. Byrd v. Bomar*, 381 S.W.2d 280 (Tenn. 1964). Further, a habeas corpus court may summarily dismiss a petition for writ of habeas corpus without the appointment of a lawyer and without an evidentiary hearing if there is nothing on the face of the judgment to indicate that the convictions addressed therein are void. *Passarella v. State*, 891 S.W.2d 619, 627 (Tenn. Crim. App. 1994), *superceded by statute as stated in State v. Steven S. Newman*, No. 02C01-9707-CC-00266, 1998 WL 104492, at *1 n.2 (Tenn. Crim. App., at Jackson, Mar. 11, 1998).

The procedural requirements for habeas corpus relief are mandatory and must be scrupulously followed. *Summers v State*, 212 S.W.3d 251, 260 (Tenn. 2007); *Hickman*, 153 S.W.3d at 19-20; *Archer*, 851 S.W.2d at 165. For the benefit of individuals such as Petitioner, our legislature has explicitly laid out the formal requirements for a petition for a writ of habeas corpus at Tennessee Code Annotated section 29-21-107:

(a) Application for the writ shall be made by petition, signed either by the party for whose benefit it is intended, or some person on the petitioner’s behalf, and verified by affidavit.

(b) The petition shall state:

(1) That the person in whose behalf the writ is sought, is illegally restrained of liberty, and the person by whom and place where restrained, mentioning the name of such person, if known, and, if unknown, describing the person with as much particularity as practicable;

(2) The cause or pretense of such restraint according to the best information of the applicant, and if it be by virtue of any legal process, a copy thereof shall be annexed, or a satisfactory reason given for its absence;

(3) That the legality of the restraint has not already been adjudged upon a prior proceeding of the same character, to the best of the applicant’s knowledge and belief; and

(4) That it is the first application for the writ, or, is a previous application has been made, a copy of the petition and proceedings thereon shall be produced, or satisfactory reasons be given for the failure so to do.

A habeas corpus court “properly may choose to summarily dismiss a petition for failing to comply with the statutory procedural requirements.” *Summers*, 212 S.W.3d at 260; *See also Hickman*, 153 S.W.3d at 21. Further, in *Summers*, our supreme court explained:

In the case of an illegal sentence claim based on facts not apparent from the face of the judgment, an adequate record for summary review must include pertinent documents to support those factual assertions. When such documents from the record of the underlying proceedings are not attached to the habeas corpus petition, a trial court may properly choose to dismiss the petition without the appointment of counsel and without a hearing.

212 S.W.3d at 261.

In this case, Petitioner did not meet the statutory requirements. He did not attach the underlying amended judgment to his Petition for Writ of Habeas Corpus or offer an explanation as to why he did not attach the judgment and the habeas court dismissed the petition for this reason. *See* T.C.A. § 29-21-107(b)(2); *State ex rel. Wood v. Johnson*, 393 S.W.2d 135, 136 (Tenn. 1965). As stated above, failure to meet the statutory requirements is sufficient basis alone for a summary dismissal of a petition for writ of habeas corpus relief. *Summers*, 212 S.W.3d at 260; *Hickman*, 153 S.W.3d at 21.

Therefore, we affirm the habeas corpus court’s summary dismissal of Petitioner’s petition for habeas corpus relief.

Conclusion

Rule 20 of the Rules of the Court of Criminal Appeals provides:

The Court, with the concurrence of all judges participating in the case, when an opinion would have no precedential value, may affirm the judgment or action of the trial court by memorandum opinion rather than by formal opinion, when:

(1)(a) The judgment is rendered or the action taken in a proceeding before the trial judge without a jury, and such judgment or action is not a determination of guilt, and the evidence does not preponderate against the finding of the trial judge,

We determine that this case meets the criteria of the above-quoted rule and, therefore, we grant the State's motion filed under Rule 20, and we affirm the judgment of the habeas corpus court.

JERRY L. SMITH, JUDGE